Supreme Court, U.S.
FILED
05-92 JUL 18 2005
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP MORRIS USA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court's equitable jurisdiction to issue "appropriate orders" to "prevent and restrain" violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1964(a), encompasses the remedial authority to order disgorgement of illegally-obtained proceeds.

PARTIES TO THE PROCEEDING

Petitioner is the United States of America. Respondents are Philip Morris USA Inc.; Altria Group, Inc.; R.J. Reynolds Tobacco Co.; Brown & Williamson Tobacco Corp. (individually and as successor by merger to the American Tobacco Co.); Lorillard Tobacco Co.; British American Tobacco (Investments) Ltd. (f/k/a British American Tobacco Co. Ltd.); Liggett Group, Inc.; The Council for Tobacco Research-U.S.A., Inc.; and The Tobacco Institute, Inc.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-78a) is reported at 396 F.3d 1190. The memorandum opinion of the district court denying defendants' motion to dismiss (Pet. App. 79a-128a) is reported at 116 F. Supp. 2d 131. The memorandum opinion of the district court denying defendants' motion for partial summary judgment (Pet. App. 129a-147a) is reported at 321 F. Supp. 2d 72. The memorandum order of the district court certifying its order denying partial summary

judgment for interlocutory appeal (Pet. App. 148a-153a) is not reported. The orders of the court of appeals granting the petition for leave to take the interlocutory appeal (Pet. App. 154a-155a) and denying the government's petition for panel rehearing and rehearing en banc (Pet. App. 156a-157a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2005. The order denying the government's petition for rehearing was entered on April 19, 2005. Pet. App. 156a-157a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1964 of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1964, is set out in the petition appendix (Pet. App. 158a-159a).

STATEMENT

The United States brought this equitable civil action under RICO based on respondents' decades-long pattern of unlawful conduct aimed at deceiving the American people about the health hazards of smoking. The United States sought, as part of its prayer for relief under RICO, a judgment enjoining respondents from committing future unlawful acts and requiring respondents to disgorge proceeds obtained through RICO violations. The district court concluded that the United States may seek disgorgement as one of the equitable remedies available under RICO. Pet. App. 117a-121a. A divided court of appeals, on respondents' interlocutory appeal, see *id.* at 149a-150a, ruled that a disgorgement remedy is not available at all. *Id.* at 23a. The government petitions this Court for review because the court of appeals' ruling is inconsistent with

this Court's decisions, squarely conflicts with the decisions of other courts of appeals, wrongly decides an important issue, and, if left uncorrected, will impede, rather than advance, the ultimate resolution of the proceedings in this extraordinarily important case.

1. In 1999, the government commenced this action, seeking relief under RICO as well as recovery of federal medical expenses under two federal statutes not at issue here. The RICO claims alleged that respondents—originally nine major tobacco companies and two related tobacco industry organizations—have conducted the affairs of an "enterprise" through a pattern of "racketeering activity" within the meaning of RICO, 18 U.S.C. 1961(1), 1962, by knowingly, falsely, and deceptively publicizing smoking as harmless and non-addictive and falsely portraying the companies' youth marketing efforts. The government alleged, as predicate acts, numerous violations of 18 U.S.C. 1341 (mail fraud) and 1343 (wire fraud). See C.A. Appellants App. 27-120 (first amended complaint).

The government made clear at the outset that it sought equitable relief under RICO's "[c]ivil remedies" provision, which authorizes district courts "to prevent and restrain violations" of RICO by "issuing appropriate orders, including, but not limited to," requiring violators to divest themselves of interests in an enterprise, restricting future activities and investments, and "ordering dissolution or reorganization of any enterprise." 18 U.S.C. 1964(a). As part of its request for equitable relief, the government sought equitable disgorgement of proceeds that respondents derived from their RICO violations. See Pet. App. 79a-80a; C.A. Appellants App. 117.

On September 28, 2000, the district court granted respondents' motion to dismiss the government's non-

RICO claims, but denied respondents' motion to dismiss the government's RICO claims. Pet. App. 79a-128a. The district court specifically rejected respondents' contention that RICO does not allow the government to seek disgorgement, *id.* at 117a-121a, noting that the Second Circuit "has declared, in a well-reasoned and persuasive opinion, that disgorgement is permissible in civil RICO claims," *id.* at 119a. See *United States* v. *Carson*, 52 F.3d 1173 (2d Cir. 1995), cert. denied, 516 U.S. 1122 (1996). Respondents did not seek interlocutory review of that ruling.

2. After four years of discovery, respondents moved for partial summary judgment on the scope of the government's disgorgement remedy. C.A. Appellee App. 19-80. Citing *Carson*, respondents argued that the government's right to disgorgement should be limited to those proceeds that either "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." C.A. Appellee App. 49 (quoting *Carson*, 52 F.3d at 1182). On May 21, 2004, the court denied respondents' partial summary judgment motion. Pet. App. 129a-147a. The court rejected respondents' contention that disgorgement under RICO is limited to ill-gotten proceeds presently available to fund further unlawful activities. *Id.* at 142a-145a.

Respondents requested the district court to certify its May 21, 2004, order for interlocutory appeal under 28 U.S.C. 1292(b), urging that the court's ruling on the "*Carson* [s]tandard" decided a controlling issue of law on which there is a substantial ground for difference of opinion and that resolution of *that* question would materially advance the resolution of the litigation. C.A. Appellee App. 89. The district court certified its order over the government's objections, concluding that the

court's decision on the *Carson* standard presented an issue warranting interlocutory review. Pet. App. 148a-153a. A motions panel of the court of appeals granted respondents' petition for leave to appeal. *Id.* at 154a-155a.

3. Although the district court certified only its May 21, 2004, order, respondents' briefing on the appeal gave only limited attention to the sole issue that order had decided—the applicability of the *Carson* standard. Rather, respondents urged the court of appeals to examine the district court's September 28, 2000, order and decide whether, as a matter of law, the government may *ever* seek equitable disgorgement under RICO. See C.A. Appellants Br. 13-53. Over a vigorous dissent, the court of appeals elected to address that issue, characterizing it as "fairly included" within the certified order. Pet. App. 6a-13a; see *id.* at 42a (Tatel, J., dissenting) (criticizing respondents' "bait and switch" tactics); see generally *id.* at 37a-49a.[1]

On the merits, the panel majority ruled that RICO's grant of judicial authority to enter appropriate orders to "prevent and restrain" statutory violations does not

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[1] The dissent observed that respondents asked the court of appeals to decide "an issue (1) not briefed in the motion leading up to the certified order, (2) not decided in the district court's opinion accompanying the certified order, (3) not raised by [respondents] in [their] request for certification, (4) not discussed in the order granting certification, (5) not raised by [respondents] in [their] section 1292(b) petition before this court, and (6) decided in an entirely different order which [respondents] could at any time have asked the district court to certify." Pet. App. 42a-43a (Tatel, J., dissenting). Through "questionable tactics," the dissent concluded, respondents "not only jumped the fence at the district court level, but also circumvented [the court of appeals'] own screening process." *Id.* at 48a-49a (Tatel, J., dissenting).